IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-87

CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER,
Petitioners,

vs.

THE CITY OF DUNEDIN, FLORIDA,
a municipal corporation,
Respondent.

**REPLY BRIEF TO
BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEALS OF
THE STATE OF FLORIDA, SECOND DISTRICT**

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INDEX

CITATION OF AUTHORITIES

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PETITIONER'S REPLY BRIEF

The petitioners believe that after a fair reading of this reply brief, this Court will determine that it should grant petitioners' petition for writ of certiorari seeking review of the opinion of the District Court of Appeal of the State of Florida, Second District. The following symbols will be used:

A — Appendix of Petitioner Contained in its Original Petition for Writ of Certiorari

B — Respondent's Brief in Opposition to Petition for Writ of Certiorari

In order to avoid confusion, petitioners will follow the format of respondent's brief.

JURISDICTION

Respondent admits to petitioners' claimed violation of their constitutional rights in the Court below.[1] Although respondent claims that careful scrutiny will reveal impediments to review of these questions and claims doubt that any federal questions were presented in the Second District Court of Appeal of the State of Florida, petitioners' reply to these charges will clearly show that these contentions are without merit. The federal questions which petitioners seek to have reviewed were determined by the Circuit Court[2] and reviewed by the District[3] Court in the last appellate opinion rendered in this cause.

QUESTIONS PRESENTED

Respondent chooses to ignore the questions presented by petitioners.[4] Instead, respondent attempts to alter this Court's consideration of the issues pointedly raised by petitioners. This should not be permitted by the Court.

STATEMENT OF THE CASE

Respondent's Statement of the Case is unsupported in material part by reference to the petitioners' appendix or other portions of the record which respondent could have, but did not bring before this Court.

1. (B 1-2)
2. (A 33-38)
3. (A 39-41)
4. (B 2)

There is no support for the statement by respondent that in 1972 it was faced with explosive growth and overloaded utilities.[5]

Respondent attempts to establish an argument that petitioners should have sought review in the Supreme Court of the United States of constitutional issues after the Supreme Court's decision in the case sub judice.[6] Respondent ignores the decision of the Florida Supreme Court which established guidelines throughout its entire decision to determine equal treatment of those who would be charged impact fees. As stated by the Supreme Court of Florida in *Contractors and Builders Association of Pinellas County vs. City of Dunedin*, 329 So.2d 314 (Fla. 1976):

> "* * On the other hand, it is not 'just and equitable' for a municipality owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain.
>
> "The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.
>
> "When certificates of indebtedness are outstanding, new users, like old users, pay rates which include the costs of retiring the certificates, which represent original capitalization. *State v. City of Miami, supra.* New users thus share with old users the cost of original facilities. For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant. *The limitation on use of the funds, shown to exist de facto in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chosen arbitrarily for that purpose.*" (Emphasis supplied by underlining) (A 31)

5. See B 2
6. (B 3)

The case was remanded to the circuit court to determine whether or not the existing conditions and ordinances showed a violation of the established guidelines set down by the Supreme Court in its opinion. The circuit judge found the guidelines to be violated:

> "Explicit in the mandate of the Court in this action is the rule that the new users of a utility should be charged only a fair and equitable share for the cost of the improvements and what is fair and equitable is to be gauged by the increased demands by the new users and that the improvements required by the new users must be specifically earmarked to justify collection of fees different from existing users.
>
> "This Court finds from the proofs before it that all of the improvements which the impact fees in issue were collected for are now in existence and are being paid for from the proceeds of a bond issue floated by the City of Dunedin. The disputed impact fees are in escrow and have not been spent, contrary to previous suggestions that they had been used in part to purchase the DYNAFLOW SYSTEM. Plaintiffs are paying their proportionate share of the bond issue as are the old users of the municipal water and sewer system. Patently, the funds collected from the impact fees which are now in escrow will not be used for construction or improvement of facilities being used by plaintiffs, but will necessarily be applied to other projects. These facts invalidate the requirements set forth by the Supreme Court in upholding a valid impact fee." (A 37)

Thus, the Circuit Court found unequal application as to the plaintiffs. The District Court in the decision sought to be reviewed acknowledged the finding by the Circuit Court but *refused* to rule upon this constitutional question:

> "Further, the trial court wrote in its supplemental judgment that 'though not necessary, it is appropriate to pass upon one other issue raised by the parties' and made the finding that all of the improvements for which the impact fees in issue were collected are now in existence and are being paid from the proceeds of bond issue floated by the City in 1974. This appeal ensues." (A 40)

As stated above, the District Court failed to rule upon this constitutional question.

Respondent contends that no appeal was taken from the fact that it had retroactively supplied the missing provisions for administration of the challenged collection of impact fees.[7] This is not the case as is demonstrated by the District Court's opinion[8] and the decision of the Circuit Court.[9]

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7. (B 3)
8. (A 39-41)
9. (A 33)

THE INVALID REASONS CLAIMED BY RESPONDENT FOR DENYING THE WRIT

1. THE CLAIM THAT THE COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION FOR CERTIORARI.

A. THE CLAIM THAT THE FEDERAL QUESTION HAS NOT BEEN PRESERVED.

Respondent claims that the petition deviates from the requirements of Rule 23(1)(f) in that it fails to specify the manner in which the federal questions asserted were raised and passed upon by the lower court.[10] This contention is erroneous. The petition for writ of certiorari filed by petitioners clearly states the manner in which the federal question was raised and how it was passed upon by the court below.[11]

Respondent ignores the fact that it is the one who appealed to the district court not petitioners. The circuit court had found inequitable and unequal treatment and a violation of the guidelines established by the Supreme Court which was squarely bottomed upon Section 1 of the Fourteenth Amendment to the United States Constitution.[12] Therefore, the contention that the assertions were not urged by petitioners in the court below is totally without foundation.

It is clear that respondent attempts to avoid review by this Court on the basis of claimed but frail technicalities. The Court should recognize this ploy for what it is and disregard it based upon the record as contained in petitioners' appendix.

10. (B 4)
11. See Petition, Pages 9-13
12. (A 37) See also (A 31)

B. THE PETITIONERS DO NOT SEEK REVIEW OF THE 1976 DECISION OF THE SUPREME COURT OF FLORIDA.

The entire argument made by respondent in regard to this point is based upon a totally inappropriate assumption, namely that petitioners are seeking to appeal the 1976 decision of the Supreme Court of Florida.[13] Even if petitioners were seeking such a review, until final State court action had terminated, review could not have been sought in the Supreme Court of the United States.

In the case of *Chesapeake and O. R. Company v. McCabe*, 29 S.Ct. 430, 213 U.S. 207, 53 L.Ed. 765 (1908), the plaintiff sought damages for negligence in the trial court of Kentucky. The trial court held that the case was properly removable to the federal court. This judgment was appealed to the Court of Appeals of Kentucky, whereupon it was reversed and remanded to the trial court for further proceedings. At the trial level, the judgment was entered for the defendant and a second appeal was taken, whereupon the judgment was again reversed and the cause was remanded for a new trial. Upon the third trial, a judgment was rendered in favor of the plaintiff for damages and this judgment was affirmed by the Court of Appeals of Kentucky. Subsequent to this final appeal, a writ of error was taken to the Supreme Court of the United States.

The petitioner sought review on the question of whether the case should have been removable to the federal courts. The respondent alleged that this petition was not timely filed as the question of jurisdiction had been settled on the first appeal to the Court of Appeals of Kentucky. The Supreme Court disagreed and stated:

> "The judgment under review was the only *final judgment* in the appellate court of the state from which plaintiff in error could prosecute a writ of error, and, until such final judgment, the case could not have been brought here for review." (Emphasis supplied)

13. (B 5-7)

And in *Louisiana Navigation Company v. Oyster Commission of Louisiana*, 33 S.Ct. 78, 226 U.S. 99, 57 L.Ed. 138 (1912), the Supreme Court of Louisiana entered an order setting aside the judgment appealed from and remanding it to the district court for further action. The petitioner brought a writ of error to the Supreme Court which was dismissed due to the fact that the state judgment was not a final one:

> "* * The rule which excludes the right to review questions arising in a cause pending in a state court until a final judgment is rendered by such court involves as a necessary correlative the power and the duty of this court when a final judgment in form is rendered and the cause is brought here for review, to consider and pass upon all the Federal controversies in the cause, irrespective of how far it may be that by the state law such questions were concluded during the litigation, and before a final judgment susceptible of review here was rendered. * *"

See also *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.*, 73 S.Ct. 196, 344 U.S. 178, 97 L.Ed. 204 (1952).

Again, it is petitioners' purpose that the Supreme Court of the United States review the trial court's determination of unequal treatment under law *after* remand by the Supreme Court and *after* the District Court of Appeal of the State of Florida, Second District's ignoring of this issue. A fair reading of petitioners' petition shows the claim of respondent of untimely filing of the petition to be LUDICROUS.

How respondent can in one breath contend that no constitutional issue was raised and admit that the District Court ruled upon the constitutional issues[14] in *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922) is unknown.

14. (B 4)

Respondent fails to acknowledge the clear argument in petitioners' brief that the District Court refused to rule upon the equal protection question in its opinion,[15] and that under decisions by this Court, such a failure will not inhibit the Court's accepting jurisdiction where the appellate court has sidestepped the issue. *Staub v. City of Baxley*, 355 U.S. 313, 78 S.C. 277 (1957); *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449, 78 S.C. 1163, 2 L.Ed.2d 1488 (1964).

Therefore, respondent's claim that the subsequent pleadings were exclusively confined to retroactive correction of the ordinance[16] is refuted by the decisions of both the circuit court and district court. The constitutional issues which establish the basis of petition for writ of certiorari were fairly raised in the court below.

Respondent *inadvertently* admits that the equal protection issue was raised in the circuit court in its reply brief, to-wit:

> "* * On remand, petitioners argued that many of the capital improvements planned in 1973 had been financed during the appeal process by a 1974 revenue bond issue, serviced by monthly charges to be exacted over many years from all customers of the city, so that petitioners would be doubly charged, and therefore *denied equal protection*, if they are required to pay an 'impact fee.' (Emphasis supplied) (B 7)

C. PETITIONERS HAVE STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS CLAIMED.

Respondent claims that at the second trial in the circuit court, it was established that all individual petitioners had disposed of their properties and, therefore, they lacked standing to challenge the ordinance or the violation of "equal protection."[17] It is further contended that the association did not

15. See Petition, Page 21

16. (B 7)

17. (B 7-8)

"aver that it represented any group of permanent customers who would be subject both to an 'impact fee' and to an ongoing burden of retiring sewer and water revenue bonds."[18] Hence, respondent states that there is serious doubt as to a case in controversy.

In reply, petitioners point out that the assertions made by respondent are unsupported by the record. The circuit court in its original opinion found that the association was bringing the suit on behalf of a number of members who had paid the impact fee assessment and all members who had paid the impact fees under protest would be entitled to refund.[19] The circuit court at the second trial found that the association's rights were vested enabling the association and other petitioners to contest the imposition of the impact fees.[20] Therefore, there is no doubt that a controversy exists or that petitioners have standing to petition this Court.

The association members without question fall within the category of those who have been denied equal protection who are subject to a continuing burden of retiring bonds issued to pay capital improvements which will not be utilized by the customers. Respondent acknowledges that petitioners "have suffered an injury in fact"[21] and it is believed that this acknowledgement alone is worthy of this Court's granting of certiorari.

When a builder pays an impact fee, it is passed on to the customer who in turn pays a like amount. Therefore, the argument that a builder would not have a cause of action under the circumstances is without merit.

D. THE CLAIM THAT THIS CAUSE IS MOOT.

Respondent contends that a curative ordinance has been enacted and petitioners are relegated to the position of arguing

18. (B 8)
19. (A 17)
20. (A 37-38)
21. (B 8)

the unfairness of charges imposed against properties no longer owned by them; hence, the case is moot.[22] This argument ignores the fact that respondent has taken money from petitioners in violation of the Constitution. It ignores the fact that they have been required to pay money for a municipal service which they will never receive. It ignores the fact that petitioners have been required to fund sewer and water projects for others in the community. It is this wrong that is sought to be redressed. The case is far from moot. As stated by the circuit court in the second trial:

> "* * In this case the Court finds that plaintiffs' rights to refund became vested prior to the enactment of Ordinances 79-19 and 76-19 and were firmly fixed by the judgment which had been entered in this Court."
>
> * * * * * * * * * *
>
> "* * Patently, the funds collected from the impact fees which are now in escrow will not be used for construction or improvements of facilities being used by plaintiffs, but will necessarily be applied to other projects. These facts invalidate the requirements set forth by the Supreme Court in upholding a valid impact fee." (A 37)

2. THE RESPONDENT CANNOT RETROACTIVELY PASS LEGISLATION RECOUPING IMPACT FEES COLLECTED BY ASSESSMENT UNDER AN ILLEGAL ORDINANCE IN CONTRAVENTION OF PETITIONERS' RIGHTS UNDER ARTICLE I, SECTION 10, AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Respondent challenges petitioners' contention that respondent cannot retroactively pass an ordinance which would permit it to certain illegally collected impact fees.[23] This contention is totally without merit.

In fact, the *Forbes Pioneer* case, supra, specifically held that the very provisions of the Constitution claimed to have been violated in the case at Bar were violated in a civil proceed-

22. (B 9)
23. (B 9-12)

ing under circumstances substantially similar to the facts in the case sub judice. Accordingly, the argument made by respondent on this point must fall.[24] Respondent ignores the cases which hold that petitioners' rights became VESTED at the time of payment under protest and the filing of suit. *City of North Miami Beach v. Trebor Construction Corp.*, 296 So.2d 490 (Fla. 1974); *Heinzman v. U.S. Home of Florida, Inc.*, 317 So.2d 838 (Fla. 2nd D.C.A. 1975); *Gables v. Sakolsky*, 215 So.2d 329 (Fla. 3rd D.C.A. 1968).

3. THE "DOUBLE ASSESSMENT" OF PETITIONERS FOR SEWER AND WATER CAPITAL IMPROVEMENTS VIOLATES PETITIONERS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAWS.

Respondent contends that petitioners have not been denied equal protection of the laws.[25] The first reason advanced is that petitioners have neither alleged nor proven that they have participated in retirement of bonds. But the circuit court has found as trier of the fact that petitioners have been denied equal protection for this very reason.[26] At this juncture, respondent cannot make such assertions.

Respondent then contends that the impact fees may be used to retire the 1974 bonds.[27] The fallacy of this argument is demonstrated by the fact that the provisions of the newly enacted curative restrictions passed by the City of Dunedin do *not* provide for retirement of such bonds.[28] Payment of the impact fees to retire a portion of the bonds without requiring other users who have not paid the impact fees to pay an equal amount for retirement of the 1974 bonds would constitute the epitomy of unequal protection and the requirement of unequal payment for sewer and water facilities provided petitioners and other users who have not paid impact fees.

24. (B 10-11)
25. (B 12-14)
26. (A 37)
27. (B 13)
28. The City enacted the very language approved by the Florida Supreme Court in its opinion at A 31.

Respondent claims that some of the improvements necessary to serve petitioners have been constructed from the 1974 bond proceeds and that all post-1972 expansion benefits have benefitted petitioners.[29] This does not make a plausible argument. The City chose a method of financing in post-1972 of floating revenue bonds. Petitioners have been retiring these bonds under that method of financing. The impact fees will not be spent to benefit them one iota. The circular reasoning advanced by respondent on this point cannot be sanctioned.

There is no evidence in the record that a portion of the 1974 bond proceeds was spent for upgrading the overall quality of utility service to all customers as claimed by respondent.[30] In fact, the Circuit Court found to the contrary.[31]

Respondent argues that the impact fees were never intended as a full and final payment of petitioners' share of the cost of new facilities.[32] This is the argument made to the circuit court which, as trier of fact, was rejected. The cost of the new facilities enjoyed by petitioners have been *totally* funded by revenue bonds. None of the moneys paid for impact fees will be or have been expended as a cost of new facilities. There is no finding by any court on appeal or otherwise which will substantiate the claims made by respondent in this regard. The argument is totally unsupported by the record and unfounded.

29. (B 13)
30. (B 13)
31. (A 37
32. (B 14)

CONCLUSION

This case is one of national importance since numerous states have passed upon questions involving impact fees.[33] This Honorable Court has never considered the subject of impact fees and the time is ripe for such a consideration. Respondent acknowledges that "There is no dispute that petitioners have suffered an injury in fact."[34] Petitioners request this Court to redress this unjury and determine the valid constitutional questions posed in this litigation.

Respectfully submitted,

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33. ***Janis Development Corp. v. City of Sunrise***, 40 F.Supp. 41 (C.C. 7th J.C. 1973; ***Weber Basin Home Builders Assoc. v. Roy City***, 487 P.2d 866 (Utah 1971); ***Metro Homes, Inc. v. City of Warren***, 173 N.W.2d 230 (Mich. 1969); ***Zehman Construction Co. v. City of Eastlake***, 195 N.E.2d 361 (Ohio 1962); ***Daniels v. Borough of Point Pleasant***, 129 A.2d 268 (N.J. 1957); ***Lloyd E. Clarke, Inc. v. City of Bettendorf***, 158 N.W.2d 125 (Iowa 1968).
34. (B 8)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of September, 1979, two copies of the foregoing Reply Brief to Brief in Opposition to Petition for a Writ of Certiorari to the District Court of Appeals of the State of Florida, Second District, have been furnished by mail to C. ALLEN WATTS, ESQUIRE, P.O. Box 3130, Deland, Florida 32720, Attorney for Respondent; and JOHN C. HUBBARD, ESQUIRE, 1960 Bay Shore Boulevard, Dunedin, Florida 33528, Attorney for Respondent.

Attorney